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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROSE FITZPATRICK, Plaintiff and Appellant, v. MEDIA NEWS GROUP, INC., et al., Defendants and Respondents.	B207866 (Los Angeles County Super. Ct. No. BC368845)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Charles T. Matthews & Associates, Charles T. Matthews and Deane L. Shanander for Plaintiff and Appellant.

Ward & Ward and Alexandra S. Ward; Roth Carney Knudsen LLP and Richard D. Roth for Defendants and Respondents.

In the underlying action, the trial court granted summary judgment against appellant Rose Fitzpatrick in her action for discrimination, retaliation, and harassment against her employer, respondent Long Beach Publishing Company, d.b.a. Press-Telegram (PT), and respondents MediaNews Group, Inc., Los Angeles Daily News Publishing Company, Rich Archbold, and John Futch. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

There are no material disputes about the following facts: PT hired Fitzpatrick in May 1998, when she was 45 years old. Fitzpatrick was initially employed as a night city editor, but soon became a day city editor. As such, she was responsible for assigning news stories to reporters and supervising their work.

In January 2001, Fitzpatrick sought the position of executive city editor, which had become vacant, and was told that it was "frozen" due to budgetary concerns. In January 2005, Fitzpatrick was diagnosed with breast cancer. She worked until she underwent surgery that successfully removed the cancer, and after a brief leave, returned to work in October 2005. In April 2006, Futch, PT's managing editor, told Fitzpatrick that Chris Berry -- a male in his thirties -- had been promoted to fill a new position denominated as "Editor for Design and Web/Technology" (web editor). In July 2006, Futch and Archbold, PT's executive editor, announced that the position of executive city editor had been "unfrozen," and that Jason Gewirtz -- a male in his thirties -- had been promoted to fill it.

After Fitzpatrick filed a complaint for discrimination, harassment, and retaliation with the California Department of Fair Employment and Housing, she initiated the underlying action against respondents. Her complaint, filed on April 3, 2007, asserted claims for discrimination based on age, sex and cancer, retaliation, and harassment under the California Fair Employment and Housing Act ((FEHA); Gov. Code, § 12900 et seq.); breach of the implied covenant of good

faith and fair dealing; and defamation. The complaint alleged, inter alia, that Fitzpatrick had been improperly denied promotions to the positions filled by Berry and Gewirtz.

On January 25, 2008, respondents filed a motion for summary judgment or adjudication on Fitzpatrick's claims. After granting the motion for summary judgment on Fitzpatrick's complaint, the trial court entered judgment in respondents' favor on May 6, 2008. On May 9, 2008, Fitzpatrick noticed her appeal from the judgment.

DISCUSSION

Fitzpatrick contends the trial court erred in granting summary judgment. We disagree.[1]

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[1] Respondents contend in their brief that Fitzpatrick has failed to provide a record sufficient to establish the errors she asserts. Their brief identifies several documents omitted from Fitzpatrick's appendix that they have independently provided in their own appendix. They argue that Fitzpatrick's appeal must be dismissed because her record -- viewed in isolation from their appendix -- precludes effective appellate review. In the alternative, they argue that her contentions fail on the limited record she has provided.

Although we agree that Fitzpatrick's record is defective -- most notably, it omits her complaint and opposition to the summary judgment -- we decline to grant respondents' request, as it does not comply with the mandatory requirements for motions on appeal (Cal. Rules of Court, rule 8.54; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (Rutter Group 2007) ¶ 5:44, p. 5-19 [motion to dismiss must be asserted in separate written motion].) We also decline to examine whether Fitzpatrick's record -- viewed in isolation -- is sufficient, as her contentions of error fail in light of the full record, including respondents' appendix.

A. *Standard of Review*

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) Thus, we apply "'the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid*.) In applying this process, we resolve any doubts as to the existence of triable issues in favor of the party opposing summary judgment.[2] (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Furthermore, in moving for summary judgment, "all that the defendant need do is show that the plaintiff cannot

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[2] Although we apply the same test as the trial court, we limit our inquiry into Fitzpatrick's claims to the contentions addressed in her opening brief. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126 [even though review of summary judgment is de novo, review is limited to issues adequately raised in appellant's brief].)

establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X." (*Id*. at p. 853, fn. omitted.)

As Fitzpatrick's briefs on appeal focus exclusively on the propriety of summary judgment regarding her FEHA claims, we limit our inquiry to these claims. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177.) Our review is further circumscribed by Fitzpatrick's failure to address the trial court's rulings on her evidentiary objections to respondents' proffered showing. Fitzpatrick relied on these objections to raise factual disputes regarding numerous items in respondents' separate statement of undisputed facts. In granting summary judgment, the trial court overruled all of her evidentiary objections. As she does not challenge these rulings on appeal, we view the pertinent items in respondents' separate statement as undisputed for purposes of our analysis. (See *id*. at p. 1182, fn. 5 [appellant's failure to address trial court's evidentiary rulings in connection with summary judgment forfeited contentions of error regarding rulings].)

B. *FEHA Claims*

1. *Governing Principles*

FEHA provides that it is an unlawful employment practice for an employer "to discriminate against [a] person in compensation or in terms, conditions, or privileges of employment" due to the person's sex, age, or medical condition. (Gov. Code, § 12940, subd. (a).)[3] Under FEHA, denials of available positions and other "adverse employment action[s]" may constitute unlawful employment practices. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1053; *Cucuzza*

[3] All further statutory citations are to the Government Code, unless otherwise indicated.

v. City of Santa Clara (2002) 104 Cal.App.4th 1031, 1038.) Aside from barring employment discrimination, FEHA provides that it is an unlawful employment practice "[f]or an employer . . . or any other person, because of . . . medical condition, . . . , sex, [or] age . . . to harass an employee. . . . An entity shall take all reasonable steps to prevent harassment from occurring." (§ 12940, subd. (j)(1).) FEHA also provides that it is an unlawful employment practice "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (§ 12940, subd. (h).)

Here, Fitzpatrick's complaint asserts she was denied promotions and suffered harassment on the basis of her sex, age, and medical condition. The complaint further asserts that respondents retaliated against her when she complained about this misconduct.

2. *Parties' Showings*

In seeking summary judgment, respondents presented evidence supporting the following version of the underlying facts: PT hired Fitzpatrick as an "at will" employee in May 1998. Her initial interview for employment was conducted by Archbold, PT's executive editor, Carolyn Ruszkiewicz, then PT's managing editor, and Jim Robinson, then PT's executive city editor. Fitzpatrick soon became PT's day city editor. After performance reviews in August 1999 and June 2000, she received three percent salary increases that were denominated "merit raise[s]."

In January 2001, Ruszkiewicz retired and Robinson was promoted to managing editor, leaving the position of executive city editor vacant. Fitzpatrick asked to be considered for it. Because PT was engaged in "downsizing" and had decided not to fill the position due to budgetary concerns, Robinson told her that

PT had "fr[ozen] the position" to save money. In June 2001, Fitzpatrick unsuccessfully asked Robinson to "reinstate" the position. Through the period the position was vacant (which ended in 2006), no one suggested to her that the decision to freeze the position was due to her age, sex, or medical condition.

After several reporters and employees complained about Fitzpatrick's performance, Robinson urged her to improve her relationships with co-employees. On June 24, 2001, Robinson noted these deficiencies in Fitzpatrick's performance review. After the review, Fitzpatrick received a three percent "merit pay" salary increase. In April 2002, Fitzpatrick also received a two percent "merit pay" salary increase. The following month she received a copy of PT's workplace harassment policy and attended training on the policy. She was instructed to report harassment to PT's human resources department.

In April 2003, Fitzpatrick received a three percent salary increase. In November 2003, she sent a memorandum to Archbold and Robinson complaining about "unfair treatment." The memo stated that she had been improperly blamed for certain problems; that Archbold and Robinson applied working hour rules more favorably to themselves and other managers than to her; and that she received too little favorable feedback on her work. In response, Archbold and Robinson met with Fitzpatrick about the memo. After the meeting, Fitzpatrick sent a follow-up memo to Archbold and Robinson in which she reaffirmed her concerns.

Following the memoranda, Fitzpatrick's salary continued to increase and her job responsibilities remained essentially the same. In February 2004, Robinson evaluated her performance. Although Robinson noted an improvement with respect to her relationships with employees and other matters, he criticized her for failing to prepare timely "weekly budgets" (that is, story proposals) and her poor relationship with another editor, Charolette Aiken. Fitzpatrick's response disputed certain criticisms, thanked Robinson for his compliments, and requested a raise on

the ground that she had assumed duties performed by the executive city editor. In April 2004, Fitzpatrick received a three percent salary increase. Robinson retired as managing editor in October 2004. Although Fitzpatrick mentioned her interest in the position to human resources manager Gloria Arango, Fitzpatrick did not apply for it.

In January 2005, Fitzpatrick was diagnosed with breast cancer. She disclosed the diagnosis to no one at PT, and continued to work. In October 2005, after she underwent surgery that successfully removed the cancer, she returned to work after a one-week leave and revealed her treatment. No one criticized her conduct. In May 2005, she received a three percent salary increase. During the same month, she again received training in PT's harassment policy, and made no complaints to PT's human resources department. In December 2005, Futch became the managing editor. At the time, PT had employed Futch for seventeen years, including four years as executive news editor, a position senior to Fitzpatrick's position of day city editor.

In April 2006, PT promoted Chris Berry to fill the newly created position of web editor. Berry had been PT's design editor, and had considerable knowledge regarding computers, software, and the internet. The position had not been "posted," and Fitzpatrick did not apply for it before Berry was selected for it.

In May 2006, Fitzpatrick received a pay increase that lifted her annual salary above $60,000. Apart from a columnist, she was the highest paid employee on PT's city desk. Setting aside the executive and managing editors, her salary placed her within the top 10 percent of newsroom employees, above Berry and several other editors.

PT decided to "unfreeze" the position of executive city editor, and the position was offered to Jason Gewirtz in July 2006. Archbold selected Gewirtz on the basis of his superior leadership abilities and staff relationships. When

Archbold and Futch met with Fitzpatrick to tell her about Gewirtz's promotion, Fitzpatrick told them that she wanted a promotion and a raise. When Archbold asked, "You want a title?," Fitzpatrick answered, ". . . Yes. And money . . . ." Fitzpatrick also asserted that they "d[id]n't like women as managers." In response, Futch pointed out that three women had recently been appointed to editorial positions. When Fitzpatrick said that she "had cancer but [she] was not dying," neither Archbold nor Futch responded to the comment. No one at PT ever told Fitzpatrick that her age, sex, or medical condition were factors in Gewirtz's promotion.

In May 2007, Fitzpatrick received a salary increase that raised her annual salary above $62,000. At the time of the summary judgment motion, she remained PT's employee.

In opposing summary judgment, Fitzpatrick conceded much of respondents' showing. She proffered the following version of the underlying facts: During Fitzpatrick's employment with PT, she has never received a promotion or monetary bonus. Her annual salary increases, though denominated as "merit raises," were merely standard raises accorded all non-union PT employees. No one has offered her an opportunity to apply for a promotion, although other individuals have been promoted.

Since 1997, PT has had no formal procedure for filling open non-union positions, such as editorial positions. The positions are not posted; instead, employees become aware of open positions through newsroom discussions. The position of web editor was neither posted nor advertised, and Archbold took no steps to solicit applications from employees. Although Futch knew Fitzpatrick had an interest in PT's Web site, he did not interview her for the position of web editor, and she was unable to apply for it because it was filled before she learned about it.

Similarly, Fitzpatrick never had an opportunity to "state her case" for the position of executive city editor, even though she had performed some of the position's duties while it was vacant. Fitzpatrick learned that the position had been unfrozen and filled only after she returned from a vacation. Although Archbold knew Fitzpatrick was interested in the position, he promoted Gewirtz to the long-vacant position because Archbold viewed him as "a person that could fill the role." Fitzpatrick believed that Gewirtz was not ready for the position. He had worked as a city hall reporter until he was promoted to the position of city editor in January 2006, and thus had held an editorial position for only six months before he became executive city editor.

According to Fitzpatrick, she has repeatedly complained about her unfair treatment during her employment, pointing to her November 2003 memorandum to Archbold and Robinson. None of the concerns she expressed in the memorandum has been resolved.

3. *Discrimination Claims*

In assessing whether summary judgment was properly granted with respect to Fitzpatrick's discrimination claims, we apply established principles. "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes. [Citation.] In particular, California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination, . . . based on a theory of disparate treatment. [Citations.]" (*Guz*, *supra*, 24 Cal.4th at p. 354.) Accordingly, had Fitzpatrick reached trial with her discrimination claims, she "would of course have borne the initial burden of proving unlawful discrimination, under well-settled rules of order of proof: '[T]he employee must first establish a prima facie [showing] of wrongful discrimination.

If she does so, the burden shifts to the employer to show a lawful reason for its action. Then the employee has the burden of proving the proffered justification is mere pretext.' [Citations.]" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1730.) These rules concerning the burden of producing evidence do not affect the burden of persuasion, which remains on the plaintiff throughout trial. (*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 143.)

With respect to discrimination based on age, gender, and medical condition, Fitzpatrick contends that respondents engaged in adverse employment actions by denying her promotions to the position of web editor and executive city editor.[4] Regarding these contentions, respondents sought to carry their burden on summary judgment by showing that there were no triable issues that they had legitimate nondiscriminatory reasons for their conduct. The trial court concluded that summary judgment was proper on this ground with respect to each discrimination claim.

Because respondents tendered a rationale for their conduct, we need not address whether Fitzpatrick established a prima facie case. (*Guz*, *supra*, 24 Cal.4th at p. 357.) As explained below, their showing shifted the burden on summary judgment to Fitzpatrick to raise a triable issue of material fact about the propriety of this rationale. Accordingly, the key question is whether she presented evidence adequate to raise a triable issue of fact that the nondiscriminatory reasons proffered by respondents were pretextual.

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[4] Fitzpatrick's reply brief also contends that she was improperly denied an opportunity to apply for the position of managing editor, which Futch filled in December 2005. As Fitzpatrick failed to raise the contention in her opening brief, she has forfeited it.

a. *Legitimate and Nondiscriminatory Basis for Conduct*

To establish that respondents had a legitimate, nondiscriminatory basis for their conduct regarding the positions of web editor and executive city editor, respondents relied primarily on a declaration from Archbold. Regarding the web editor position, Archbold stated: "On or about April 24, 2006, I approved [Berry's appointment] for a new position . . . . At the time of his selection, in addition to his copy editing responsibilities, Berry was the principal news desk resource . . . regarding computer programs, software programs, the internet and in maintaining (from an information technology standpoint) the [PT] Web site. For those reasons, I approved the appointment of Berry as [web editor]."

Regarding the position of executive city editor, Archbold stated: "In or about January 2001, . . . the freezing of the . . . position was approved by the [p]ublisher of [PT] for operational/budgetary reasons. [¶] . . . [¶] In July 2006, when I was authorized to fill the . . . position, [] Futch and I evaluated the job performance[s] of [] Gewirtz and Fitzpatrick and determined that, in our opinion, Gewirtz was the better choice for the position because Gewirtz had superior leadership and people skills and had the respect of the staff. I then selected Gewirtz for the position." In addition to Archbold's declaration, respondents pointed to Fitzpatrick's conflicts with other employees and other problems noted in her performance reviews.

Based on this showing, the trial court concluded that respondents had shown legitimate nondiscriminatory reasons for their employment actions regarding Fitzpatrick. We agree. As our Supreme Court has explained, an employer's need to limit or restructure its workforce does not invariably constitute a legitimate and nondiscriminatory basis for adverse employment actions. (*Guz*, *supra*, 24 Cal.4th at p. 358.) However, if an employer's reasons for its conduct are not discriminatory, they "need not necessarily have been wise or correct. [Citation.]

While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, 'legitimate' reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding *of discrimination*. [Citations.]" (*Id*. at p. 358.)

Here, respondents' evidence indicates that Berry and Gewirtz had qualifications that made them more attractive candidates than Fitzpatrick for their respective positions. Because nothing in respondents' showing suggests that Archbold's and Futch's reasons for their decisions were discriminatory, the reasons constitute a proper basis for the decisions, regardless of whether they were "wise or correct." (*Guz, supra*, 24 Cal.4th at p. 358.)

b. *No Triable Issues Regarding Pretext*

Because respondents proffered legitimate, nondiscriminatory reasons for their conduct, the burden on summary judgment shifted to Fitzpatrick to show that their "actual motive was discriminatory." (*Guz, supra*, 24 Cal.4th at p. 361, fn. omitted.) The remaining issue, therefore, is whether the record as a whole discloses evidence supporting the rational inference that notwithstanding their proffered reasons, respondents acted with an improper discriminatory motive. As explained below, Fitzpatrick failed to carry her burden.

At this point, to avoid summary judgment, [Fitzpatrick] had to "offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination. [Citation.]" An employee in this situation cannot "simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee '"must

demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the . . . non-discriminatory reasons.' [Citations.]" [Citations.]' [Citation.]" (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 806-807.)

As our Supreme Court has explained, the existence of discriminatory motives cannot be inferred solely from deficiencies in the employer's proffered reasons for its conduct, even when the evidence establishes that these reasons are untrue: "Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions. [Citation.]" (*Guz, supra*, 24 Cal.4th at pp. 360-361.)

i. *Age and Sex Discrimination*

Regarding age and sex discrimination, Fitzpatrick contends that the fact that males in their thirties obtained the promotions in question, coupled with the circumstances surrounding the promotions, raises triable issues concerning pretext. She points to her qualifications and experience, as well as the evidence that the positions were neither posted nor advertised, that she was not interviewed for them, and that she learned about them only after they were filled.

This evidence is insufficient to preclude summary judgment. Although the fact that the positions were filled by males under 40 years of age may support a prima facie case of gender and age discrimination (*Cucuzza v. City of Santa Clara, supra*, 104 Cal.App.4th at p. 1038; *Hersant v. Department of Social Services*

(1997) 57 Cal.App.4th 997, 1003), that fact, viewed in isolation, does not raise a triable issue regarding pretext. (See *Guz*, *supra*, 24 Cal.4th at p. 362; *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 376-377.)

Nor does the remaining evidence do so. Generally, an employee's self-assessment of his or her performance and qualifications does not raise triable disputes about pretext. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 79; *Horn v. Cushman & Wakefield Western, Inc.*, *supra*, 72 Cal.App.4th at p. 816.) Moreover, as it is undisputed that PT had *no* formal procedures regarding newsroom promotions, the manner in which the positions were filled does not show pretext. Even when an employer has formal employment procedures, its departure from the procedures, by itself, is insufficient to show pretext, absent evidence raising the reasonable inference that the departure was discriminatory. (See *Randle v. City of Aurora* (10th Cir. 1995) 69 F.3d 441, 445; *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1422.) Here, there is no evidence that the positions were filled in an unusual manner; generally, open positions were not posted or advertised, and nothing before us suggests that interested employees were ordinarily entitled to interviews for open positions.

In an effort to raise a triable issue regarding pretext, Fitzpatrick directs our attention to some statistical evidence regarding the gender and age of PT's employees. In support of the motion for summary judgment, respondent submitted a declaration from Gloria Arango, PT's human resources manager, who stated: "Of the 269 employees employed at [PT] during calendar year 2006, 145 employees (or 54%) were over the age of 40; and [] 118 employees (or 44%) were female. During the same period, in the newsroom (including the [c]ity [d]esk), out of 102 employees employed, 38 employees (or 37%) were over the age of 40 and 35 employees (or 34%) were female." Pointing to the disparities between the

newsroom and PT as a whole, Fitzpatrick argues that "one must infer and conclude that the hiring and promoting process has a disparate impact on women and people over forty years of age."

In our view, the statistical evidence is not cognizable on appeal. Although the summary judgment obliges the parties to identify material evidence in their separate statements, the trial court has the discretion to consider evidence not referenced in the separate statements. (*Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 722, fns. 6 & 7; *Wall Street Network, Ltd. v. New York Times Co., supra*, 164 Cal.App.4th at pp.1189-1191; *San Diego Watercrafts, Inc.* (2002) 102 Cal.App.4th 308, 315-316.) Here, Fitzpatrick's separate statement and opposition papers do not refer to the statistical evidence. Although respondents' moving and reply papers mentioned the evidence, they never argued that it was critical to their motion, and their separate statement does not cite it. As the evidence is not identified in the parties' separate statements and Fitzpatrick never relied upon it in opposing summary judgment, the trial court did not err in disregarding it.

Moreover, even if considered, the evidence does not support an inference of discrimination. Fitzpatrick contends that the evidence supports her claims for intentional discrimination by raising the inference that PT's hiring and promotion practices had a discriminatory *impact* on its employees. Her contention thus invokes distinct theories of discrimination. As our Supreme Court has explained: "'Disparate treatment' is *intentional* discrimination against one or more persons on prohibited grounds. [Citations.] Prohibited discrimination may also be found on a theory of 'disparate impact,' i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class. [Citations.]" (*Guz, supra*, 24 Cal.4th at p. 354, fn. 20.)

Generally, disparate impact claims are established through the analysis of statistical data. (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1323-1326.) As statistical analysis is vulnerable to misapplication, a party seeking to establish a prima facie case of "disparate impact" discrimination must tender more than statistical data suggestive of discrimination. (*Id*. at pp. 1323-1324.) The party must identify "'the specific employment practice that is challenged'" and prove causation, that is, "'offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" (*Ibid*., quoting *Watson v. Fort Worth Bank & Trust* (1988) 487 U.S. 977, 994-995.)

Although claims of intentional discrimination may also find support in statistical evidence of this sort, the plaintiff, in seeking to raise a triable issue regarding pretext, must "'show a stark pattern of discrimination unexplainable on grounds other than [a proscribed reason].'" (*Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740, 747-748 (*Pottenger*), quoting *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1283; see *Rose v. Wells Fargo & Co.*, *supra*, 902 F.2d at p. 1423.) Thus, in *Pottenger*, the plaintiff was discharged when his employer reduced its workforce, and he asserted age discrimination claims based on disparate treatment. (*Pottenger*, *supra*, 329 F.3d at pp. 743, 747.) To avoid summary judgment on the claims, the plaintiff argued that his employer's asserted reasons for his termination were pretextual, pointing to a statistical analysis of the workforce reduction from an expert, who found a correlation between age and termination. (*Id*. at pp. 747-748.) The Ninth Circuit concluded that the analysis raised no triable issue regarding pretext, as the expert had failed to consider and eliminate nondiscriminatory explanations for the correlation. (*Id*. at p. 748.)

Here, Fitzpatrick relies on nothing more than statistical disparities, unaccompanied by any analysis that considers and excludes nondiscriminatory

explanations. Moreover, the record, viewed as a whole, discloses no "'stark pattern of discrimination'" (*Pottenger, supra*, 329 F.3d at pp. 747-748), as respondents submitted undisputed evidence that Archbold hired and promoted many female employees during his tenure as executive editor. Accordingly, the statistical evidence cannot avert summary judgment on Fitzpatrick's discrimination claims.

To show that improper motives influenced Archbold's behavior, Fitzpatrick points to a remark he made in Fitzpatrick's presence. Fitzpatrick submitted evidence that at a meeting of department heads in 2006, Archbold commented on a column by PT's religion writer regarding her own wedding, and stated that he agreed with the writer's statements that "women should be obedient to their husbands."

This evidence does not support a rational inference of sex discrimination when viewed in the context of the entire record. So-called "'stray'" remarks by a person charged with an employment decision -- that is, remarks that may suggest bias but are remote, isolated, or otherwise unrelated to the decision -- do not establish discrimination. (*Gibbs v. Consolidated Services* (2003) 111 Cal.App.4th 794, 798-799, 801 [supervisor's remark that person seeking supervisory position in truck company "was too old to be a driver" insufficient to show age discrimination]; *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703, 705 [supervisor's remark, "[W]e don't necessarily like grey hair" and vice-president's remark, "'We don't want unpromotable fifty-year olds around,'" viewed in context, did not raise triable issue regarding age discrimination]; *Rose v. Wells Fargo & Co., supra*, 902 F.2d at p. 1423 [decision maker's reference to employee as member of "'an old-boy network'" did not establish age discrimination]; *Merrick v. Farmers Ins. Group* (9th Cir. 1990) 892 F.2d 1434, 1438-1439 [decision maker's reference to successful applicant for position as "'a

bright, intelligent, knowledgeable young man'" did not prove age discrimination].) Here, Archbold's remark occurred while he commented on a newspaper column that concerned marriage, not employment, and it did not refer in any way to Fitzpatrick. In our view, it amounted to a "stray" remark that does not support a reasonable inference of discrimination.

On appeal, Fitzpatrick identifies another remark by Archbold as additional evidence that he acted with improper gender-related motives. According to Fitzpatrick, after Archbold interviewed a female candidate for the position of managing editor, which had become vacant when Robinson retired in October 2004, Archbold said to a male friend, "They don't want people like us anymore."

Because neither side referred to this remark in its separate statement or otherwise identified it to the trial court, Fitzpatrick cannot rely upon it on appeal, as it is found only in the parties' evidentiary showings, which comprise several hundred pages of documents. For the reasons explained above, "the trial court may properly disregard evidence that 'is not referenced, is hidden in voluminous papers, and is not called to the attention of the court at all.'" (*Jones v. P.S. Development Co., Inc.*, *supra*, 166 Cal.App.4th at p. 722, fn. 6, quoting *San Diego Watercrafts, Inc. v. Wells Fargo Bank*, *supra*, 102 Cal.App.4th at p. 316.) However, were we to consider the comment, we would conclude that it constitutes a stray remark, in view of its vague import and remoteness from Fitzpatrick's employment relationship.

Fitzpatrick suggests that there is a triable issue regarding pretext because respondents have characterized her salary raises as "merit raises," even though Archbold testified in his deposition that they were routinely given to newsroom employees. As it is undisputed that respondents never denied her raises of this sort, their characterization of the raises, by itself, cannot reasonably be regarded as a barrier to summary judgment. As our Supreme Court has explained, inaccuracies

in the employer's proffered reasons for its conduct do not preclude summary judgment, absent evidence adequately supporting an inference of discrimination. (*Guz*, *supra*, 24 Cal.4th at pp. 360-361.) Here, the label respondents have attached to the salary increases does not support the reasonable inference that they acted with discriminatory motives.

Fitzpatrick also suggests that there is a triable issue whether PT initially "froze" the position of executive city editor due to financial concerns, directing our attention to excerpts from Archbold's deposition testimony. Before the trial court, Fitzpatrick pointed to the following testimony:

> "Q. . . . [W]hat happened in 2006 to cause you to believe that you needed to fill this position when you hadn't for the previous five years?
>
> "A. It had been a position that I was thinking about filling for that whole five-year period.
>
> "Q. What made you turn thought into action?
>
> "A. I finally had a person that could fill the role.
>
> "Q. Because -- it was because you had one specific person that you wanted to use in that position that you decided to fill it?
>
> "A. That is right."

Although this excerpt suggests that Archbold had been thinking about filling the position since it had been frozen, it does not address when, in fact, he received the authority to do so. As Archbold expressly stated in his declaration that he was authorized to fill the position in July 2006, the excerpt, viewed in the context of the entire record, does not raise the reasonable inference that PT's purported reason for "freezing" the position was pretextual.

On appeal, Fitzpatrick relies on a second excerpt from Archbold's deposition:

> "Q. Was there anything financially that had changed to make you feel that

it was appropriate to open up the executive city editor position?

"A. Well, if I could explain that. [¶] This was not a brand-new position when I did fill it. What I did was take a person who was already being paid and increased his pay. So the impact on our budget was not as great as it would have been if I had brought someone from the outside or created this position as a brand new position."

Because the parties never called this excerpt to the trial court's attention, it is not cognizable on appeal. Moreover, were we to consider the excerpt, its relevance to PT's initial reasons for freezing the position is speculation, as it does not address PT's financial circumstances in 2001; rather, it explains Archbold's reasons for promoting a current employee instead of hiring an "outside" applicant.[5] In sum, Fitzpatrick's discrimination claims based on sex and age fail for want of a triable issue regarding pretext.

ii. *Medical Condition Discrimination*

Fitzpatrick's discrimination claim based on her medical condition also fails for similar reasons. Her sole evidence that Archbold denied her a promotion due to her cancer is another remark he purportedly made while interviewing candidates for the position of managing editor, which became vacant in October 2004. According to Fitzpatrick, after interviewing a male candidate, Archbold said that the candidate probably had health problems because his hands shook during the interview. As this remark -- like the remark following the interview of the female candidate for the same position (see pt. B.3.a, *ante*) -- was never brought to the

[5] In addition, to the extent the excerpt might raise a dispute about when Archbold became authorized to fill the position, it does not suggest that Archbold acted with discriminatory motives in selecting Gewirtz.

trial court's attention, Fitzpatrick may not rely upon it on appeal; moreover, it cannot reasonably be regarded as more than a stray remark.

4. *Harassment*

Fitzpatrick's harassment claim is predicated on allegations that respondents singled her out for harsh treatment on the basis of her gender. FEHA's prohibition against sexual harassment "includes protection from a broad range of conduct, ranging from expressly or impliedly conditioning employment benefits on submission to or tolerance of unwelcome sexual advances, to the creation of a work environment that is hostile or abusive on the basis of sex." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 461.) Here, Fitzpatrick does not contend that respondents conditioned her employment on submitting to unwelcome sexual advances; she argues only that they created a hostile or abusive work environment. The crux of her contention is that during her employment, Archbold has belittled, demeaned, and yelled at her, and thereby made her work environment difficult to tolerate.

The trial court concluded that Fitzpatrick failed to provide sufficient evidence to show harassing conduct proscribed under FEHA. We agree. As our Supreme Court has explained, "to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees *because of their sex.* [Citations.]" (*Miller v. Department of Corrections*, *supra,* 36 Cal.4th at p. 462, italics added.) In this regard, the employee must show that "'"if the plaintiff 'had been a man she would not have been treated in the same manner.'"' [Citation.]" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 280 (*Lyle*).) Thus, "a hostile work environment sexual harassment

claim is not established where a supervisor or coworker simply uses crude or inappropriate language in front of employees or draws a vulgar picture, without directing sexual innuendos or gender-related language toward a plaintiff or toward women in general. [Citations.]" (*Id*. at p. 282.)

An instructive application of these principles is found in *Lyle*. There, a comedy writer's assistant asserted a harassment claim against her employer, which produced a popular television comedy show. (*Lyle*, *supra*, 38 Cal.4th at pp. 271-272.) The assistant alleged that the coarse and sexually-charged discussions among the show's comedy writers as they developed scripts created a hostile work environment. (*Ibid*.) Our Supreme Court concluded that summary judgment had been properly granted on her claim, reasoning that she failed to show that the writers' offensive remarks or antics were specifically aimed at her or other female employees. (*Id*. at pp. 286-294.)

Fitzpatrick presented no evidence that respondents made offensive or improper gender-related remarks to her. Her principal evidence of the existence of a hostile work environment is the memo she sent to Archbold and Robinson in November 2003. The memo stated that Archbold had unfairly blamed her for delays related to a reporter's project; that she had to share certain responsibilities for the city desk with another editor, due to the absence of an executive city editor; that Archbold, Robinson, and two other managers -- apparently males -- were "allowed to come and go as they please without working eight hours and without arriving on time for regularly scheduled meetings"; that she had been criticized for turning in job evaluations late, whereas Robinson and other managers had not been so criticized; and that Archbold frequently criticized her, but rarely complimented her for well-performed work.

In our view, this evidence fails to raise a triable issue whether Fitzpatrick was subject to harassment under FEHA. Generally, "[a] party cannot avoid

summary judgment based on mere speculation and conjecture [citation], but instead must produce admissible evidence raising a triable issue of fact. [Citation.]" (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524.) Here, nothing in the memo supports the reasonable inference that Fitzpatrick was singled out for improper treatment due to her *gender*. The memo is silent whether Archbold and Robinson directed the sort of treatment about which she complained only toward her or women in the newsroom. Although the memo indicates that Archbold, Robinson, and two other male managers exempted themselves from some work-related rules, it does not suggest that the rules were enforced only against Fitzpatrick or women in the newsroom. Indeed, to the extent the memo concerned extra duties Fitzpatrick had assumed due to the absence of an executive city editor, the record indicates that her complaint was not gender-related, as she later reasserted the complaint on behalf of herself and two other editors, one of whom was male. Summary judgment was thus proper with respect to the harassment claim.

5. *Retaliation*

Fitzpatrick contends that respondents retaliated against her for complaining about their purportedly discriminatory and unfair conduct by denying her promotions, unfavorably evaluating her job performance, and harassing her. Under FEHA, retaliation claims, like discrimination claims, are subject to the federal "three stage burden-shifting test." (*Guz*, *supra*, 24 Cal.4th at p. 354.) "The elements of . . . [FEHA] claims require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant articulate a legitimate nonretaliatory explanation for its acts, and (3) the plaintiff show that the defendant's proffered explanation is merely a pretext for the illegal [conduct]. [Citations.] [¶] . . . To establish a prima facie case, the [employee] must show that [she] engaged in a

protected activity, [her] employer subjected [her] to adverse employment action, and there is a causal link between the protected activity and the employer's action. [Citations.]" (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.)

Here, as with Fitzpatrick's discrimination claims, respondents offered a showing of legitimate nonretaliatory reasons for their conduct.[6] The trial court concluded that Fitzpatrick failed to raise a triable dispute whether their conduct was, in fact, retaliatory, notwithstanding their proffered reasons. We see no error in this determination.

In seeking summary judgment, respondents proffered evidence that they had a legitimate non-retaliatory basis for "freezing" the position of executive city editor, for offering the position of web editor to Berry, and for eventually offering the executive city editor position to Gewirtz. In addition, respondents submitted evidence that Fitzpatrick had poor relationships with other employees, as described in Robinson's evaluations. As explained above, Fitzpatrick failed to raise triable issues regarding these matters (see pt. B.3, *ante*), and also failed to raise triable issues regarding whether she was subject to harassment (see pt. B.4, *ante*). Summary judgment on Fitzpatrick's retaliation claim was therefore proper.

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[6] In view of this showing by respondents, we do not address whether Fitzgerald established a prima facie case of retaliation. (See *Guz*, *supra*, 24 Cal.4th at p. 357.)

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.